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City Council

City of Eugene
777 Pearl Street, Room 105
Eugene, Oregon 97401-2793
(541) 682-5010
(541) 682-5414 Fax
(541) 682-5045 TTY

96-98

December 8, 1999

Chairman William Kennard
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Reply Comments of City of Eugene, Oregon, in WT 99-217, CC 96-98 - Notice of Inquiry, Promotion of Competitive Networks in Local Telecommunications Markets

Dear Chairman Kennard:

The City of Eugene, Oregon is writing to express to you and the Federal Communications Commission our serious concern with regard to the comments about Eugene made by AT&T, Sprint, and ALTS in the above proceeding. This letter replies to those comments.

Before moving into the body of our reply, we are dismayed that FCC procedural rules allow the Commission to hear unfounded allegations from one side in this proceeding without notifying municipalities cited by name. Compounding this oversight in notification processes, there is the over-riding failure on the part of the industry commenters in this proceeding to recognize the jurisdictional boundaries established by Congress under the 1996 Act. Eugene is in receipt of the comments filed by the National League of Cities (NLC), of which Eugene is a member, and endorses and supports NLC's comments.

Industry Comments About Eugene

Specifically addressing the comments provided by AT&T, Sprint, and ALTS, it appears that they construe any attempt by a municipality to *manage* its rights of way as an unnecessary tier of regulation. Eugene has never sought to and does not duplicate any of the programs or procedures of the Oregon Public Utilities Commission or the Federal Communications Commission.

--While the case referred to by AT&T (page 15-16) was decided by one lower court in favor of AT&T, the ruling by Judge Merten was not accompanied by any written or oral opinion giving the reasons for the decision. Since industry members had attacked Eugene's ordinance on both state law grounds and on federal law grounds, it is impossible to tell whether Judge Merten even reached the Section 332(c)(3) issues raised by industry, much less determined whether Eugene had "overstepped" the bounds of Section 332(c)(3). At most, the Eugene litigation makes clear that courts provide a more than adequate forum for industry's supposed grievances, and there is no need for FCC intrusion. This case should be permitted to proceed in our courts without interference.

AT&T also mis-characterizes Eugene Code Sections 3.405, 3.410, and 7.290(1). Wireless carriers do not have to apply for any license if no use of the public rights of way is involved. Instead, a simple 2-line questionnaire is provided that asks for name and location of sites with the City limits. This request does

not duplicate any Commission procedure. Now, for those providers that use the public rights-of-way (ROW), Eugene most certainly wants to know who is seeking occupancy and how and where they propose to use the ROW. Municipal rights in this regard are clearly protected by the Act. Approval of right-of-way use/occupancy is granted by a "license" in Eugene---a vehicle which replaces what are now known as "franchises", the latter being a far more involved and lengthy process than licensure. Finally, the City's *permit* process is standard municipal operating procedure that relates solely to the construction or cut aspects of right of way occupancy.

On page 24, AT&T fails to admit that registration fee is a 2% business privilege tax applied to all telecommunications providers that own or manage facilities within the city limits. AT&T is paying the exact type of tax in Portland (2.2%) that they have decided to object to in Eugene. Tucson also has an identical 2% business privilege tax--one phone call will demonstrate compliance by telecommunications providers. Eugene's State law taxing authority is at the root of our court appeal; this is a singular attempt by AT&T to discredit Eugene's authority while complying with identical procedures in other cities. Remembering that *licensure* replaces all *franchises* in Eugene, the license fee at 7% is identical to existing franchise fees that similarly situated providers have been paying for years as compensation for use of the public ROW. The 7% fee is also expressly authorized by Oregon law (ORS. 221.515). AT&T's objection is being litigated in Oregon State Court; oral arguments are expected in spring 2000.

The Commission need not become involved in these issues which, by statute, are to be handled locally by the courts. The process being employed by this inquiry is fostering divisiveness between providers and cities who, for the most part have enjoyed successful working relationships. All *new* providers coming into Eugene's "tier 3" market have complied with the procedures of our ordinances, although multiple levels of administrative and judicial appeal were available. AT&T is among four incumbent providers who faced, some for the first time, true competition by incoming providers under a set of commonly applied rules. Bypassing any administrative avenues of appeal, they raced directly for judicial relief. The Commission should not be used as a misguided avenue to thwart the intent of the Act or to meddle in pending court disputes between parties.

--**Sprint** (page 4) would want the Commission to believe that a Eugene lower court decision (same case and Judge as in the AT&T citation) has created "a body of case law" that "has put further definition on what local governments may and may not do with regard to their franchise authority". Given Judge Merten's refusal to provide any written or oral explanation of his ruling, and the fact the case was immediately appealed by the City of Eugene, we are at a loss to see how the Commission can believe that Judge Merten's decision contributed to any "body of law" at all.

--**ALTS** (page 3 of Appendix A) also briefly describes the AT&T litigation against Eugene's ordinance. While summary judgement was entered by Judge Merten in state court, no written or oral explanation accompanied the judgement and Eugene immediately filed its appeal.

Objections to the Proposed Rule

While Eugene objects to the Commission moving forward with the inquiry, we want to record our objections to the rule proposed to allow any phone company to serve any tenant of a building and to place their antenna on the building roof. We will also describe our objections to industry proposed rules that would permit the FCC to pre-empt local rights-of-way management programs and procedures.

1. Is the FCC aware that in some states 70 or more new phone companies have been certificated to

provide service (in *Eugene* alone, the number of wireline and wireless providers has doubled). The need to provide new service choices to customers must be analyzed in conjunction with the City's land use management policies. Under industry's proposal, cities would be forced to allow every company to place their wires in a building, and their antennas on the roof, all without a landowner's permission nor with any consideration of the viewshed, or other land use issues lawfully placed within municipal hands.

We simply cannot understand how the FCC has determined it has the authority to consider these issues. It would violate the basic right that a landlord, city or condominium has regarding who comes onto their property. Congress did not give the FCC the authority to essentially enter into a condemnation proceeding en masse for tens or hundreds of phone companies in every building in the country.

Eugene has difficulty understanding how the FCC can preempt state and local building codes, zoning ordinances, environmental legislation and other laws affecting antennas on roofs. Zoning and building codes are purely matters of state and local jurisdiction, which under Federalism and the Tenth Amendment the FCC may not preempt. For example, building codes are imposed in part for engineering related safety reasons. Can the FCC really speak for us in the northwest when codes vary by region, weather patterns and building type, such as the likelihood of earthquakes, hurricanes and maximum amount of snow and ice? If antennas are too heavy or too high, roofs collapse. If they are not properly secured, they will blow over and damage the building, its inhabitants or passers-by.

Similarly, zoning laws are matters of local concern which protect and promote the public health, safety and welfare, ensure compatibility of uses, preserve property values and the character of our communities. We may restrict the numbers, types, locations, size and aesthetics of antennas on buildings (such as requiring them to be properly screened) to achieve these legitimate goals, yet see that needed services are provided. This requires us to balance competing concerns, which we do every day with success in conjunction with our duly elected officials and the stakeholders of our cities--our citizens.

Cities have an 80-year history of applying and balancing zoning policies and principles. Zoning is not impeding technology or the development of our economy. In 1997, Eugene enacted a new tower zoning and siting ordinance and industry has voiced no opposition to it since its adoption and new tower facilities have been erected. There is simply no basis to conclude that for a brand-new technology (wireless fixed telephones) with a minuscule track record that there are problems to warrant FCC action.

2. Please do not permit the FCC to preempt local rights-of-way management and compensation that are essential to protect the public health, safety and welfare. By adopting the Gorton amendment, (Section 253 (d)), Congress has specifically prohibited the FCC from acting in this area. The telephone providers' complaints about rights-of-way management and fees are overblown. All in all, given the vast growth of the industry and the existence of over 38,000 local governments nationwide, there is a very small number of court cases in the three years since the 1996 Act. It may be notable to mention that while Eugene is one such city whose right-of-way ordinance is being litigated, the litigation was brought by the incumbent providers---no new provider has either joined that litigation or refused to comply with *Eugene's* rights-of-way management policies and procedures. With 38,000 municipalities nationwide and thousands of phone companies this small number of court cases shows that the system is working, not that it is broken. For every incumbent suing a city, we can show you many more who are entering into new and exciting partnerships to serve new local markets---all accomplished while complying with existing rights of way management and compensation procedures. There is simply no need or authority for FCC involvement.

Finally, we are surprised that you are weighing in with an official stance that suggests that the combined Federal, state and local tax burden on new phone companies is too high. The FCC has no authority to

affect state or local taxes any more than it can affect Federal taxes.

For these reasons please reject industry's proposed rules in this process and take no action on rights of way and taxes. As a member of the National League of Cities' Information Technology and Communications (ITC) committee and chair of ITC's Universal Access subcommittee, I have had many opportunities to review and assist in developing initiatives and recommendations on issues related to industry-proposed rules such as these within the context of the Act. As former chair of Eugene's Council Committee on Telecommunications and current chair of our Intergovernmental Relations Committee, I understand the importance of thorough study of complex issues facing Eugene, in particular. Rather than move forward on these industry proposed rules, I invite the Commission to consider first a visit *to Eugene* to learn more directly how local government can produce successful partnerships with providers and create more service options for our citizens, all while effectively managing the public rights-of-way.

Very truly yours,

Nancy Nathanson pcl

Councilor Nancy Nathanson

cc:

Commissioner Harold Furchtgott-Roth
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Commissioner Michael Powell
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Commissioner Gloria Tristani
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Commissioner Susan Ness
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Mr. Jeffrey Steinberg
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street SW
Washington D.C. 20554

Mr. Joel Tauenblatt
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street SW
Washington D.C. 20554

International Transcription Services
445 12th Street SW
Room CY-B402
Washington D.C. 20554

Mr. Kevin McCarty, Assistant Executive Director
U.S. Conference of Mayors
1620 I Street - Fourth Floor
Washington D.C. 20006

Ms. Barrie Tabin, Legislative Counsel
National League of Cities
1301 Pennsylvania Ave., N.W. - 6th Floor
Washington D.C. 20004

Mr. Robert Fogel
Associate Legislative Director
National Association of Counties
440 First Street, N.W. - 8th Floor
Washington D.C. 20001

Senator Ron Wyden
SH -717 Hart
Washington, D.C. 20510

Representative Peter DeFazio
2134 Rayburn
Washington, D.C. 20510

Senator Gordon Smith
359 Dirksen SOB
Washington, D.C. 20510

Ms. Libby Beaty, NATOA Executive Director
1650 Tysons Road - Suite 200
McLean, VA 22102-3915

Mr. Thomas Frost
Vice President, Engineering Services
BOCA International
4051 West Flossmoor Road
Country Club Hills, IL 60478